UNITED STATES *v.* FERRIS.

APPEAL FROM THE COURT OF CLAIMS.

No. 217. Argued April 8, 1924.—Decided May 26, 1924.

An army officer was not "serving with troops operating against an enemy," within the meaning of § 7 of the Act of April 26, 1898, c. 191, 30 Stat. 364, while exercising a command in a camp of instruction in this country during the late war in Europe. P. 166. 57 Ct. Clms. 566, reversed.

APPEAL from from a judgment of the Court of Claims which sustained the claim of an army officer for increased pay and allowances.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

Mr. George A. King, with whom *Mr. William B. King* and *Mr. George R. Shields* were on the brief, for appellee.

Mr. Morrison Shafroth, by leave of Court, filed a brief as *amicus curiae*.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This was a suit by the plaintiff, a Lieutenant-Colonel of Field Artillery, National Army, in the service of the United States, to recover increased pay and allowances for exercising a command as Colonel of Field Artillery from August 27, 1917, to January 5, 1918. His action is

based on § 7 of the Act of Congress of April 26, 1898, c. 191, 30 Stat. 364, 365, as follows:

"That in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised. . . ."

There is no dispute that the claimant is in every respect within the provision of this act except in the requirement that he was "serving with troops operating against an enemy." The Court of Claims held that this requirement was complied with, and gave judgment. 57 Ct. Clms. 566. The counsel for the Government oppose this view and seek by this appeal to reverse the judgment.

The claimant exercised his command as Colonel over the 315th Field Artillery, which was part of the 80th Division of the National Army. The division was organized and trained at Camp Lee, Virginia, and later on became a part of the American Expeditionary Force and engaged in action with the enemy.

During the whole period from August 22, 1917, to January 5, 1918, in which the claimant acted as Colonel, the regiment was stationed at Camp Lee, Petersburg, Virginia, and this camp was used as a camp of instruction.

Was this officer serving with troops operating against an enemy? The requirement is that the service shall not only be in time of war, but also with troops operating against the enemy. Troops in instruction camps across the ocean from the field of war can not in any proper sense be held to be operating against the enemy. Camp instruction is doubtless a necessary preliminary step to effective operation against the enemy, but it does not constitute such operation. This act was passed during the Spanish War and the Court of Claims rested its con-

clusion on the opinion of the Attorney General, 22 Ops. Atty. Gen. 95, in which he held that troops assembled in camps of instruction in the United States were to be considered as operating against an enemy under the statute. We think that the construction is so at variance with the ordinary meaning of the language that we can not follow it. It can hardly be said to have become the basis for a long executive construction and practice, because the Spanish War was soon over and the question of its application did not arise until the recent great war. We agree with the opinion of the Paymaster General in 1898 in this matter. He said:

"As yet, although war has been declared to exist between Spain and the United States, there are, in my opinion, with the exception of the troops embarked for the Philippine Islands, no troops 'operating against an enemy'. There is, within our borders, no enemy, within the meaning of the law, for troops to operate against. An army has been called together, and is being drilled, disciplined, and prepared to operate against an enemy, but until that army embarks for a foreign country, or until an enemy appears on our shores, and the army confronts it, it is held that no officer can receive the pay of a higher grade by virtue of anything in the act referred to."

The judgment of the Court of Claims is reversed.